IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 17, 2006 Session

JAMES F. MEEK v. HEALTHSOUTH REHABILITATION CENTER OF CLARKSVILLE, ET AL.

Appeal from the Circuit Court for Montgomery County
No. 50200255 Ross H. Hicks, Judge

No. M2005-00920-COA-R3-CV - Filed on July 28, 2006

The appeal arises from the summary dismissal of a medical malpractice action against a physical therapy clinic. The plaintiff alleges he was injured during post-surgery physical therapy. The trial court dismissed the claim finding the plaintiff did not establish a prima facie case of liability for failure to establish proximate cause. The plaintiff contends the evidence was sufficient and, in the alternative, he was entitled to the rebuttable presumption afforded by *res ipsa loquitur*, Tenn. Code Ann. § 29-26-115(c). Finding no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Mark R. Olson, Clarksville, Tennessee, for the appellant, James F. Meek.

Frank Grace, Jr., and Terrence O. Reed, Nashville, Tennessee, for the appellees, HealthSouth Rehabilitation Center of Clarksville, Tennessee, and Lisa T. Odle.

OPINION

For over a decade, James F. Meek suffered from osteoarthritis in both shoulders, a condition described by Meek's treating physician as the wearing away of the cartilage surface on the end of a bone at the shoulder joint. The condition caused inflammation and pain in both of Meek's shoulders. His treating physician, Dr. David K. DeBoer, recommended replacement surgery on both shoulders.

Meek underwent the first shoulder replacement surgery in August 1999. That surgery, on his right shoulder, was successful and uneventful. He underwent the same surgery on his left shoulder in August of 2001. As before, Meek participated in physical therapy, as Dr. DeBoer recommended. Meek received his physical therapy from HealthSouth Rehabilitation Center of Clarksville, Tennessee.

Meek's primary therapist at HealthSouth was Lisa Odle. On September 28, 2001, during a routine treatment session with Odle, Meek experienced pain and heard a "popping" sound in his left shoulder when raising his arm over his head. Four days later, Meek went to see Dr. DeBoer, who examined him and determined the subscapularis tendon was torn. Dr. DeBoer recommended surgery to repair the tear.

The second surgery on Meek's left shoulder was performed in October of 2001, following which Meek experienced discomfort and limited range of motion due to scar tissue that formed post-surgery. Dr. DeBoer performed a third surgery on the left shoulder in February of 2002 to remove the scar tissue. Meek, however, continued to experience pain and some limitation in movement of the left shoulder.

Meek filed this medical malpractice action on April 19, 2002 against HealthSouth and Ms. Odle (collectively "HealthSouth"), contending their negligent treatment was the cause of the tear to the subscapularis tendon which necessitated the two additional surgeries. HealthSouth filed a general denial. Thereafter, it filed a motion for summary judgment, contending Meek failed to establish that the physical therapy administered by HealthSouth more likely than not caused Meek's injuries.

The motion was originally set to be heard in January 2005, however, Meek requested and was given additional time to obtain expert testimony to respond to HealthSouth's motion for summary judgment. Thereafter, Meek filed a second motion seeking additional time to obtain and produce expert affidavits necessary to establish the prima facie case for his medical malpractice claim. The second continuance was granted and the motion was re-set for March 4, 2005. Meek filed a third motion seeking additional time; however, he withdrew that motion and the parties went forward with the motion on summary judgment in March.

At the March hearing, Meek relied solely on Dr. DeBoer's deposition testimony to establish that HealthSouth's treatment more likely than not caused Meek's injury. At the conclusion of the hearing, the trial court found Dr. DeBoer's testimony insufficient to establish proximate cause. Accordingly, the trial court granted HealthSouth's motion for summary judgment and dismissed Meek's medical malpractice claim.

Meek appeals claiming he presented sufficient evidence to establish proximate cause and, in the alternative, he relies on *res ipsa loquitur* for his prima facie case.

STANDARD OF REVIEW

The issues were resolved in the trial court upon summary judgment. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Advertising & Publishing Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997). We consider the evidence in the light most favorable to the non-moving party and

resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we first determine whether factual disputes exist. If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc*., 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

Summary judgments are proper in virtually all civil cases that can be resolved on the basis of legal issues alone, *Byrd v. Hall*, 847 S.W.2d at 210; *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001); however, they are not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that party is entitled to judgment as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d at 695. Summary judgment should be granted at the trial court level when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion, which is the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Webber v. State Farm Mutual Automobile Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001). The court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, discard all countervailing evidence, and, if there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. *Byrd v. Hall*, 847 S.W.2d at 210; *EVCO Corp. v. Ross*, 528 S.W.2d 20 (Tenn. 1975). To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party's claim or establish an affirmative defense that conclusively defeats the non-moving party's claim. *Cherry v. Williams*, 36 S.W.3d 78, 82-83 (Tenn. Ct. App. 2000).

PROXIMATE CAUSE

In Tennessee, medical malpractice claims are governed by Tenn. Code Ann. § 29-26-115. This statute requires expert proof of every element of the claim in order to make out a prima facie case. *Kennedy v. Holder*, 1 S.W.3d 670, 671 (Tenn. Ct. App. 1999). A plaintiff in a medical malpractice case bears the burden of proving by expert testimony: 1) the applicable standard of acceptable professional practice; 2) that the defendant's conduct fell below that standard of care; and 3) that a proximate result of the defendant's negligent act or omission resulted in injuries to the plaintiff that would not have otherwise occurred. Tenn. Code Ann. § 29-26-115(a)(1-3); *Moon v. Saint Thomas Hospital*, 983 S.W.2d 225, 229 (Tenn. 1998); *Stones River Hospital Inc.*, 40 S.W.3d 47, 51 (Tenn. Ct. App. 2000). This statute codifies the common law elements of negligence-duty, breach of duty, causation, proximate cause and damages, *Cardwell v. Bechtol*, 724 S.W.2d 739, 753 (Tenn. 1987). A claim for negligence cannot succeed in the absence of any one of these elements. *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993).

In this dispute, the parties only raise as an issue the third element of the statute requiring proximate cause between the defendant's act or omission and the injury. Tenn. Code Ann. § 29-26-

115(a)(3). Proximate cause must be proven by a preponderance of the evidence. *Bradshaw,* 854 S.W.2d at 869; *McClenahan v. Cooley*, 806 S.W.2d 767, 774 (Tenn. 1991). While absolute medical certainty is not required to establish proximate cause, *Kilpatrick v. Bryant,* 868 S.W.2d 594, 601 (Tenn. 1993), the plaintiff must establish "it is more likely than not that the defendant's negligence caused plaintiff to suffer injuries which would have not otherwise occurred." *Boburka v. Adcock*, 979 F.2d 424, 429 (6th Cir. 1992). Thus, we must consider whether or not Meek presented sufficient evidence to show that it is more likely than not that HealthSouth's treatment caused Meek to suffer injuries that would not otherwise have occurred.

Meek asserts that Dr. DeBoer's expert medical testimony was sufficient to establish the physical therapy caused the injury. HealthSouth contends the expert proof submitted by Meek is insufficient because it merely establishes that the physical therapy was possibly a cause of the injury. We have concluded, as the trial court did, that the deposition testimony of Dr. DeBoer, which is Meek's only evidence of proximate cause, fails to establish that the physical therapy administered by HealthSouth more likely than not caused the tear to Meek's subscapularis tendon.

While being questioned by both parties, Dr. DeBoer remained consistent as to his inability to credit the injury to a specific source.

> Q: But you don't know for sure that [injury] happened at therapy?
> A: I don't know for sure.
> * * *
> A: [I]t was either related to a position of the shoulder or a force from the muscle.
> Q: But now, in your opinion this could have happened while he was at physical therapy at HealthSouth or while he was performing his home exercise therapy?
> A: Right. There's no way for me to know where this occurred.
> * * *
> A: All I can tell you is what occurred and I can speculate what happened, but I can't – I don't know for sure. I wasn't there.
> * * *
> Q: All right. Now I understand your hesitance to say what specifically caused this man's injury, and for the purpose of our discussion I want to make sure that I isolate that. You can't say how this happened, because you weren't there, correct?
> A: That is correct. I was not there.
> Q: But you can state to a reasonable degree of medical certainty based upon the history you obtained and based upon tests that you performed and based upon the fact that you've operated on this man's right shoulder once and had therapy and his left shoulder three times, you can state that this injury occurred as a result of that tendon being stretched too much or with too much force during the first weeks following surgery, correct?
> A: That's most likely what happened, correct.
> Q: To a reasonable degree of medical certainty, that is what happened?
> A: Correct.

> Q: But in terms of how that actual injury occurred, that's something you can't really express an opinion on because you weren't there, correct?
> A: I don't know that answer. All I know is what the patient relayed to me.

Meek admitted in his deposition that he exercised his shoulder at home without the assistance or supervision of HealthSouth or its employee Lisa Odle. He also admitted that he engaged in many of his regular activities. Dr. DeBoer testified that the injury could have occurred while Meek was exercising his shoulder or engaged in normal activities.

> Q: Well, could this have happened while he was doing some normal activity, other than physical therapy or his home exercise program?
> * * *
> A: It's possible.

Dr. DeBoer's testimony reveals he could not opine that the physical therapy more likely than not caused the injury. As he explained, the tear to the subscapularis tendon was the result of either a position of the shoulder or force from the muscle, which might or might not have occurred during physical therapy; thus, there was more than one possible cause of Meek's post-surgery injury.

Meek had the burden of establishing by a preponderance of the evidence the proximate cause between HealthSouth's acts or omissions and the alleged injury. *See* Tenn. Code Ann. § 29-26-115(a)(3); *Bradshaw*, 854 S.W.2d at 869; *McClenahan*, 806 S.W.2d at 774. At best, Dr. DeBoer's testimony established there was a possibility the injury was a result of the physical therapy, but a possibility is not sufficient to establish a proximate cause. Proof of causation "equating to a 'possibility,' a 'might have,' 'may have,' 'could have,' is not sufficient, as a matter of law, to establish the required nexus between the plaintiff's injury and the defendant's tortious conduct by a preponderance of the evidence in a medical malpractice case." *Kilpatrick*, 868 S.W.2d at 602.

RES IPSA LOQUITUR

Meek asserts the trial court erred by not affording him the benefit of the rebuttable presumption under *res ipsa loquitur* to establish a prima facie case against HealthSouth. We find Meek's reliance on *res ipsa loquitur* misplaced.

The common law doctrine of *res ipsa loquitur* is codified in Tenn. Code Ann. § 29-26-115(c). It provides:

> In a malpractice action as described in subsection (a), there shall be no presumption of negligence on the part of the defendant; provided, there shall be a rebuttable presumption that the defendant was negligent where it is shown by the proof that the instrumentality causing injury was in the defendant's (or defendants') exclusive control and that the accident or injury was one which ordinarily doesn't occur in the absence of negligence.

Tenn. Code Ann. § 29-26-115(c). *Res ipsa loquitur* may be used in certain circumstances to prove negligence.[1] *Res ipsa*, however, has no application to proving causation. *German v. Nichopoulos*, 577 S.W.2d 197, 202 (Tenn. Ct. App. 1978), *overruled on other grounds by Seavers v. Methodist Med. Ctr. of Oak Ridge*, 9 S.W.3d 86 (Tenn. 1999). Stated another way, "proof of negligence via *res ipsa* does not constitute proof of causation." *Id*.

The trial court summarily dismissed the complaint based upon Meek's failure to prove causation. Meek had the burden to prove "it is more likely than not" that HealthSouth's negligence caused his injury. *Boburka*, 979 F.2d at 429. The trial court found he failed to prove the element of causation, and *res ipsa loquitur*, if applicable, would not cure that deficiency.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against appellant, James F. Meek.

FRANK G. CLEMENT, JR., JUDGE

[1] *Res ipsa loquitur* does not dispense with a plaintiff's burden of proof; it merely allows an inference of negligence where the jury has a common knowledge or understanding that events which resulted in the plaintiff's injury do not ordinarily occur unless someone was negligent. *Seavers v. Methodist Med. Ctr. of Oak Ridge*, 9 S.W.3d 86 (Tenn. 1999). Traditionally, the use of *res ipsa loquitur* in medical malpractice cases in Tennessee was confined to cases that fell within the common knowledge exception. The common knowledge exception applied "where the alleged acts of negligence are so obvious that they come within the common knowledge of laymen." *Kennedy v. Holder*, 1 S.W.3d 670, 672 (Tenn. Ct. App.1999). Classic examples of common knowledge cases are those where a sponge is left in the patient's body following surgery or where the patient's eye is cut during an admission for an appendectomy. *See Rural Educ. Ass'n v. Bush*, 298 S.W.2d 761 (Tenn. Ct. App. 1956); *Meadows v. Patterson*, 109 S.W.2d 417 (Tenn. Ct. App. 1937). Our Supreme Court, however, extended the permissible use of *res ipsa loquitur* in *Seavers*, overruling cases that had held *res ipsa loquitur* could not be used if expert testimony was required. *Seavers*, 9 S.W.3d at 86. The *Seavers* Court held that "expert testimony may be used to establish a prima facie case of negligence under *res ipsa loquitur*." *Id*. at 96. The Court further explained, "*res ipsa loquitur* is no longer confined in Tennessee to the realm of cases within the 'common knowledge' of the jurors. Instead, *res ipsa loquitur* may be used in combination with expert testimony to raise an inference of negligence, even in those cases where expert testimony is required." *Id*. at 98.